

**From:** Sibley, Shawn S [<mailto:SSibley@adem.alabama.gov>]  
**Sent:** Thursday, October 4, 2018 2:11 PM  
**To:** Biffl, Betsy <[Biffl.Betsy@epa.gov](mailto:Biffl.Betsy@epa.gov)>  
**Subject:** Discrimination Investigation Procedure - Redline Draft

Betsy,

Based on our recent conversations and pursuant to your client's request for publication, please find attached a redlined version of our Discrimination Investigation Procedure. Please let me know if this is consistent with your client's recommendations or if there are any additional suggestions. When your client completes its review, we'll have our contractor interpret it and provide those versions to you and your client for review. Please feel free to call me if you need to discuss or have any questions.

Thank you, - Shawn

S. Shawn Sibley  
Office of General Counsel  
Alabama Department of Environmental Management  
Post Office Box 301463  
Montgomery, Alabama 36130-1463  
(334) 260-4544 (Phone/Fax)  
[ssibley@adem.alabama.gov](mailto:ssibley@adem.alabama.gov)



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DATE: October , 2018,

Deleted: August 10, 2018

TO: Marilyn Elliot, Deputy Director  
ADEM Nondiscrimination Coordinator

FROM: Lance R. LeFleur, Director

RE: Title VI Grievance Investigation Procedures

The Nondiscrimination Coordinator will process complaints alleging discrimination by the Alabama Department of Environmental Management (ADEM) on the basis of race, color, national origin, disability, age, sex, or retaliation based on a pending discrimination complaint, as follows:

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(2) In cases where the complainant is unable or incapable of providing a written statement, a verbal complaint of discrimination will be forwarded to the Nondiscrimination Coordinator at (334) 271-7710. The complainant will be interviewed by an ADEM employee who, if necessary, will assist the person in converting verbal complaints to writing.

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(3) All complaints alleging discrimination by ADEM shall be reviewed for the following information:

- a. the specific action(s) by ADEM that allegedly discriminate or result in discrimination in violation of 40 C.F.R. Parts 5 and 7.
- b. the specific impact that allegedly has occurred or will occur as the results of such action(s); and
- c. the identity of the parties subjected to, impacted by, or potentially impacted by the alleged discrimination.

(4) Within ten working days of receipt of the complaint, ADEM will provide the complainant or his/her representative with a written acknowledgement of receipt and notice of how the complaint will be investigated. ADEM will also notify complainants that their complaint may also be filed with the U.S. EPA, External Civil Rights Compliance Office, 1200 Pennsylvania Avenue, N.W., Mail Code 1201A, Washington, DC 20460-1000 in accordance with 40 C.F.R. Parts 5 and 7.

(5) The Nondiscrimination Coordinator, based on the information in the complaint and any additional information provided by the complainant, will determine if the matters alleged are within the jurisdiction of 40 C.F.R. Parts 5 and 7, and whether the complaint has sufficient merit to warrant an investigation. These determinations will be made within fifteen working days after the receipt of the complaint by

ADEM. A complaint will be regarded as meriting investigation unless:

- a. It clearly appears on its face to be frivolous or trivial;
- b. Within the time allotted for making the determination of jurisdiction and investigative merit, ADEM voluntarily concedes noncompliance and agrees to take appropriate remedial action or reaches an informal resolution with the complainant; or
- c. Within the time allotted for making the determination of jurisdiction and investigative merit, the complainant withdraws the complaint.

(6) If the Nondiscrimination Coordinator accepts the complaint, the Coordinator will designate an individual to investigate the allegation(s). After examining all of the information in light of the requirements of 40 C.F.R. Parts 5 and 7, the investigator will draft a report with findings and recommendations.

(7) In the event that the complainant has not submitted sufficient information to make a determination of jurisdiction or investigative merit, ADEM may request additional information. This request shall be made within fifteen working days of the receipt of the complaint by ADEM. The complainant is under no obligation to provide any requested information.

(8) In the case of complaints involving third party entities; e.g. a sub-recipient, permit applicant or permittee, ADEM will notify the third party entity that the complaint has been received no later than the time of the written notice provided to a complainant that the complaint is complete. At such time, ADEM will ask the third party entity to provide information necessary for ADEM to investigate the complaint. ADEM will use the information provided by the third party entity and the complainant in resolving the complaint.

(9) Within 120 days of accepting the complaint, the Office of the Director will respond in writing to the complainant approving or disapproving the findings and recommendations made in the investigative report, based upon a preponderance of the evidence. ADEM will implement the recommendations approved by the Office of the Director.

(10) ADEM employees shall not retaliate, intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege granted under 40 C.F.R. Parts 5 and 7, or because an individual has filed a complaint or has testified, assisted, or participated in any way in an investigation, or has opposed any practice made unlawful under 40 C.F.R. Parts 5 and 7.

BY AND THROUGH THIS DELEGATION OF RESPONSIBILITIES TO THE ADEM NONDISCRIMINATION COORDINATOR, THE ABOVE PROCEDURES ARE HEREBY ADOPTED TO ASSURE THE PROMPT AND FAIR RESOLUTION OF COMPLAINTS WHICH ALLEGE UNLAWFUL DISCRIMINATION UNDER TITLE VI AND 40 C.F.R. PART 7.

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Lance R. LeFleur, Director

**Deleted:** ¶

THIS INTERIM PROCEDURE MAY BE AMENDED FROM TIME TO TIME BEFORE A FINAL PROCEDURE IS ADOPTED.¶

¶

¶

**From:** Biffi, Betsy

**Sent:** Thursday, October 11, 2018 9:20 AM

**To:** 'Sibley, Shawn S' <[SSibley@adem.alabama.gov](mailto:SSibley@adem.alabama.gov)>

**Subject:** RE: Discrimination Investigation Procedure - Redline Draft

Hi Shawn,

Hope you all didn't get too many bad effects in Montgomery from Hurricane Michael, and that the rest of your state escaped the worst of it. Looks like a terrible storm.

Attached are the grievance procedures you sent last week, with a few comments/suggestions. The document was changing all comments to "Author" so we noted they were from EPA. Please feel free to call if you want to discuss any of them.

Thanks, and look forward to talking again soon.

**Betsy Biffi**

**EPA Office of General Counsel**

**Civil Rights Practice Group**

**(202) 564-3389**



DATE: October, 2018

Deleted: August 10, 2018

TO: Marilyn Elliot, Deputy Director  
ADEM Nondiscrimination Coordinator

FROM: Lance R. LeFleur, Director

RE: Nondiscrimination Grievance Investigation Procedures

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- c. the identity of the parties subjected to, impacted by, or potentially impacted by the alleged discrimination.

Commented [A1]: EPA Comment: We recommend ADEM add something like: "ADEM will take reasonable steps to provide meaningful access to this process to individuals with limited-English Proficiency and/or a disability, including providing assistance to such individuals with filing a discrimination complaint and understanding ADEM's Nondiscrimination Grievance Procedures."

(4) Within ten working days of receipt of the complaint, ADEM will provide the complainant or his/her representative with a written acknowledgement of receipt and notice of how the complaint will be investigated. ADEM will also notify complainants that their complaint may also be filed with the U.S. EPA, External Civil Rights Compliance Office, 1200 Pennsylvania Avenue, N.W., Mail Code 1201A, Washington, DC 20460-1000 in accordance with 40 C.F.R. Parts 5 and 7.

Commented [A2]: EPA comment: ADEM should add the limitations period for filing a complaint (*i.e.*, the amount of time between the alleged discriminatory act and the filing of the complaint), such as 120, 180, etc.

(5) The Nondiscrimination Coordinator, based on the information in the complaint and any additional information provided by the complainant, will determine if the matters alleged are within the jurisdiction of 40 C.F.R. Parts 5 and 7, and whether the complaint has sufficient merit to warrant an investigation. These determinations will be made within fifteen working days after the receipt of the complaint by

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**Commented [A3]:** EPA Comment: It is not clear what you mean by "complete." Does this mean at the time you acknowledge receipt of the complaint (para 4), or when you notify the complainant that it merits investigation (para 5), or after you've requested and received additional information, if necessary (para 7)? We recommend clarifying.

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¶

**Deleted:** AND

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Lance R. LeFleur, Director

**From:** Sibley, Shawn S [<mailto:ssibley@adem.alabama.gov>]  
**Sent:** Thursday, November 1, 2018 5:21 PM  
**To:** Biffl, Betsy <[Biffl.Betsy@epa.gov](mailto:Biffl.Betsy@epa.gov)>  
**Subject:** Updated and Translated Discrimination Procedures  
**Importance:** High

Betsy,

Attached are the translations of the updated ADEM procedure for investigating Title VI discrimination complaints. Thank you for your suggestions, which have been substantively incorporated into the updated procedure.

As per our ongoing discussions and that of our respective clients, the previous procedure utilized EPA's suggested template and was signed by the Director over 14 years ago. Since every Title VI complaint made against ADEM during the time this procedure was in place was made directly to EPA's Office of Civil Rights or ECRCO rather than ADEM, the ADEM procedure was not utilized. The internal ADEM Memorandum setting out the procedure was published on ADEM's website pursuant to ECRCO's suggestion in April of 2016. In 2018 ADEM rescinded the internal memorandum setting out the procedure, removed the internet version from the Department's website, provided a direct website link to contact the Department's Non-Discrimination Coordinator, and implemented a temporary procedure pending finalization of the updated procedure.

The updated ADEM procedure goes beyond EPA's template by reducing the burden on anyone filing a discrimination complaint with the Department. This will hopefully encourage those with complaints to address them with the Department, rather than with ECRCO. The transmittal of the translations attached to this correspondence completes our updating process and the procedure has now been finalized. Again, thank you again for your suggestions and cooperation in reviewing the updates.

Since ADEM has continuously had a procedure in place for investigating Title VI discrimination complaints, though it was briefly interim, but now finalized; EPA File No. 01R-18-R4 should be dismissed with no findings of violation of Title VI.

Sincerely, - Shawn

S. Shawn Sibley  
Office of General Counsel  
Alabama Department of Environmental Management  
Post Office Box 301463  
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DATE: November 5, 2018

TO: Marilyn Elliot, Deputy Director  
ADEM Nondiscrimination Coordinator

FROM: Lance R. LeFleur, Director

RE: Nondiscrimination Grievance Investigation Procedures

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Lance R. LeFleur, Director



**Alabama Department of Environmental Management**  
[adem.alabama.gov](http://adem.alabama.gov)

1400 Coliseum Blvd. 36110-2400 ■ Post Office Box 301463  
Montgomery, Alabama 36130-1463  
(334) 271-7700 ■ FAX (334) 271-7950

August 13, 2018

BY EMAIL and

CERTIFIED MAIL (NO. 91 7108 2133 3936 7150 8054)

RETURN RECEIPT REQUESTED

Lillian S. Dorka, Director  
U.S. Environmental Protection Agency  
External Civil Rights Compliance Office (Mail Code 2310A)  
1200 Pennsylvania Avenue, NW  
Washington, D.C. 20460-1000



RE: EPA File No. 03R-18-R4

Dear Ms. Dorka:

The Alabama Department of Environmental Management ("ADEM") received your Notice of Acceptance of Administrative Complaint No. 03R-18-R4 for investigation on July 13, 2018. This letter serves as our response to your notice. We also are in receipt of your Request for Information on the same date, and our responses are attached.

ADEM denies that the rescission of Memorandum 108 in the course of pending state court litigation constitutes an act of discrimination or discriminates against any person. As indicated in our responses to your Request for Information, ADEM is following interim investigation procedures until resolution of the underlying lawsuit. No person has been denied an opportunity to file a grievance complaint with ADEM, and to our knowledge no person has attempted to file a grievance complaint since the rescission, including the complainants in this case. Because no one has been discriminated against, further investigation of 01R-18-R4 is not warranted.

By responding to your Notice and Request for Information, ADEM does not waive and reasserts its previous objections to your Office's departure from past practice of avoiding acceptance of complaints regarding matters in litigation. As you will see, our responses are conditional and interim responses that may change depending on rulings from the court. Because the subject matter of "Memorandum 108" is now pending in state circuit court and will likely be resolved in that forum, ADEM requests that ECRCO dismiss EPA File No. 03R-18-R4 based upon the same rationale as set forth in the dismissal of the Uniontown complaint (01R-12-R4) on September 26, 2012, to wit:

"In situations where the allegations raised in the complaints involve the same facts that are also the subject of litigation in Federal court, such that the result of those proceedings could affect the outcome of the Title VI investigation, it is OCR's general practice to dismiss without prejudice the



Lillian S. Dorka, Director  
U.S. Environmental Protection Agency  
External Civil Rights Compliance Office  
August 13, 2018  
Page Two

administrative complaint, pending results of the litigation. Therefore, OCR is dismissing without prejudice, complaint 01R-12-R4, pending results of the litigation."

In situations where the same subject matters are being litigated, the former practice is a logical and preferred practice that would avoid conditional or interim responses that are subject to change depending on rulings from the court.

As you and your Office should be aware after investigating repeated complaints against this agency, we have a track record of commitment to the principles of nondiscrimination at ADEM. Where suggested improvements have been recommended, we have been receptive to incorporating those recommendations. Indeed, the adoption of Memorandum 108 back in 2004 was the result of our efforts to coordinate with EPA in developing grievance procedures modeled on those followed and approved by EPA. More recently, we posted Memorandum 108 on the ADEM website based on your recommendation. More telling of our commitment, however, is the fact that none of the complaint investigations has resulted in a finding of discrimination. That record deserves consideration as you weigh the complainants' allegation that rescission of Memorandum 108 was made with discriminatory intent. And because no person has been denied an opportunity to file a complaint, there also is no discriminatory effect. The rescission of Memorandum 108 was not an act of discrimination. 03R-18-R4 is due to be dismissed.

If you have any questions concerning our responses, please contact Shawn Sibley, ADEM Office of General Counsel, at (334) 271-7855.

Sincerely,



Lance R. LeFleur  
Director

LRL:lc

Attachments:

- Response to Information Request
- Interim Procedures



**Enclosure 1**

**EPA File No. 03R-18-R4  
ADEM Response to Information Request**

1. Does ADEM currently have in effect grievance procedures that assure the prompt and fair resolution of complaints that allege violation of EPA nondiscrimination regulation, as required by 40 C.F.R. § 7.90(a)?

*Yes. As ECRCO is aware, the grievance procedures ADEM has had in place for the past 14 years were challenged in state court litigation (by the same complainants who filed Complaint No. 03R-18-R4) based on allegations that "Memo 108" was not compliant with the Alabama Administrative Procedures Act (AAPA) because it was not promulgated via notice and comment rulemaking. In that litigation, the complainants further allege that in order to support promulgation of the required grievance procedure the state legislature must first enact a state civil rights statute, rather than relying on federal civil rights statutes.*

*ADEM does not agree that 40 C.F.R. Part 7 requires the State of Alabama, or any other state, to have a state civil rights statute. Nor does ADEM agree that EPA's regulations require "promulgation" of the required grievance procedure. Nonetheless, in connection with the state law issues being litigated in state court, ADEM rescinded Memo 108 in order to modify and amend the document. Pending the outcome of that litigation, the ADEM director has instructed the ADEM Nondiscrimination Coordinator in the interim to continue to accept, review and investigate complaints based on his delegation of authority.*

2. If yes, please provide us a copy of ADEM's grievance procedures and the effective date of these procedures.

*See: Director's memo to Nondiscrimination Coordinator.*

3. If yes, are these grievance procedures available to the public? Please describe how (in what form or format) these procedures are available to the public.

*Notice to the public is provided via the ADEM website which identifies how and where to file complaints of discrimination.*

4. If ADEM does not have in effect grievance procedures that assure prompt and fair resolution of complaints which allege violation of the EPA nondiscrimination regulation, please describe the steps that ADEM is taking to put in effect grievance procedures as required by 40 C.F.R. § 7.90(a)?

*See answers to #1-3, above.*

5. Has ADEM received any complaints between June 5, 2017 and June 5, 2018, under the nondiscrimination grievance procedures contained in Memorandum 108? If yes, please provide a copy of each complaint. Please describe how each complaint was addressed.

*None. Nor did ADEM receive any complaints during the entire 14 years Memo 108 was in place.*

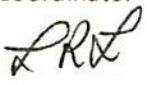


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FROM: Lance R. LeFleur, Director 

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Lance R. LeFleur, Director



**ADEM**



ALABAMA

DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

1400 COLISEUM BOULEVARD MONTGOMERY, ALABAMA 36110-2059

MAILING ADDRESS: POST OFFICE BOX 301463 MONTGOMERY, ALABAMA 36130-1463



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**AUG 20 2018**

Lillian S. Dorka, Director

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